

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH

BRADFORD LAINE SALTERS,

Plaintiff,

vs.

SMITH'S FOOD AND DRUG,

Defendant.

MEMORANDUM DECISION
and REPORT AND RECOMMENDATION

Case No: 2:08-cv-901 DAK

District Judge Dale A. Kimball

Magistrate Judge David Nuffer

A Motion to Dismiss¹ filed by Defendant Smith's Food and Drug (Smith's) is pending. Under 28 U.S.C. § 636(b)(1)(B), District Judge Dale A. Kimball referred² this case to the magistrate judge for a report and recommendation on all dispositive issues.

On June 3, 2009, Smith's filed the motion to dismiss because it had not been served within 120 days as required by Federal Rule of Civil Procedure 4(m). Plaintiff has not responded to this motion. Plaintiff's failure to timely respond to the motion is enough to justify granting the motion to dismiss.³ The magistrate judge recommends that the District Court grant the motion to dismiss based on Plaintiff's failure to respond as well as on the merits of the arguments contained

¹Motion to Dismiss, docket no. 7, filed 6/3/09.

²Order of Referral, docket no. 6, filed 12/23/08.

³DUCivR 7-1(d) ("Failure to respond timely to a motion may result in the court's granting the motion without further notice.").

in the memorandum.⁴

Plaintiff's complaint was filed on December 4, 2008 after the court received the appropriate filing fee.⁵ Plaintiff should have served Smith's no later than April 3, 2009, which is 120 days after the December 4, 2008 filing of the complaint. Yet, through the date of this report, there is no indication on the docket that Smith's has been served.

RECOMMENDATION

Because Plaintiff has failed to respond to the Motion to Dismiss, and because Plaintiff has failed to serve the Defendant within 120 days as required by Rule 4, it is recommended that the District Court grant the Motion to Dismiss⁶ and dismiss the case without prejudice.

NOTICE

Within 10 days after being served with a copy of this recommended disposition, a party may serve and file specific, written objections. A party may respond to another party's objections within 10 days after being served with a copy thereof. The rules provide that the district judge to whom the case is assigned shall make a *de novo* determination upon the record, or after additional evidence, of any portion of the magistrate judge's disposition to which specific written objection has been made in accordance with this rule. The district judge may accept,

⁴Memorandum in Support of Motion to Dismiss, docket no. 8, filed 6/3/09.

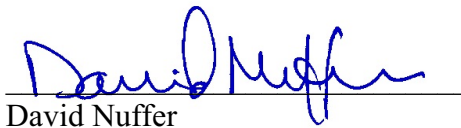
⁵Complaint, docket no. 4, filed 12/4/09.

⁶Docket no. 7.

reject or modify the recommended decision, receive further evidence, or re-commit the matter to the magistrate judge with instructions.

August 7, 2009.

BY THE COURT:

A handwritten signature in blue ink, appearing to read "David Nuffer", is written over a horizontal line.

David Nuffer
U.S. Magistrate Judge